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INSURANCE-LIABILITY OF INSURER FOR JUDGMENT IN EXCESS OF POLICY LIMITS

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INSURANCE—LIABILITY OF INSURER FOR JUDGMENT IN EXCESS OF POLICY LIMITS—A liability insurer has issued a policy, reserving the sole right to effect a settlement, and refuses to settle, within the limits of the policy, a claim against the insured. A judgment in excess of the policy limit is then recovered against the insured. These circumstances present the question whether the insurer may be liable to the insured for the amount of the judgment in excess of the policy limit.

This comment will be limited to consideration of cases involving only the above facts, and no attempt will be made to consider the liability of the insurer for failing to undertake defense of the claim, to continue in defense of it or to prosecute an appeal. Nor will regard be given to the effect of cooperation clauses, settlement by the insured or improper conduct of the defense by the insurer.

The modern liability insurance contract gives the insurer the right to control the investigation, settlement and defense of claims,[1] and there seems to be no dispute that the insurer has the right to settle rather than to defend if he so chooses. The important question is, what is his duty to settle? The courts have denied that a mere election to

[35] Managements have done so in the past, Slutzker v. Rieber, 132 N.J.Eq. 406, 28 A. (2d) 525 (1942); U.S. Steel Corp. v. Hodge, 64 N.J.Eq. 807, 54 A. 1 (1902).

[1] A typical policy provision is as follows: "The insurers shall have the exclusive right to contest or settle any of said suits or claims. The assured shall not interfere in any way respecting any negotiations for the settlement of any claim or suit, nor in the conduct of any legal proceedings, but shall at all times, at the request of the insurers, render to them all possible cooperation and assistance. The assured shall not voluntarily admit or assume any liability for an accident, nor incur any expense other than for immediate surgical relief, nor settle any claim except at the assured's own cost." Wakefield v. Globe Indemnity Co., 246 Mich. 645 at 647, 225 N.W. 643 (1929).

defend makes the insurer liable for any excess of a judgment over the policy limits,[2] but it appears that he may be liable under certain circumstances when he has refused an offer to compromise the claim within the policy limits.

This liability is not in contract,[3] for the contract imposes no such obligation on the insurer;[4] rather, liability is based on tort, the duty of the insurer arising out of the relationship established by the contract. The courts are not agreed, however, as to the nature of the relationship[5] or the extent of the insurer's duty. The earlier cases refused to impose any duty upon the insurer and held that the parties were strictly bound by their contract;[6] therefore, the insurer could not be liable to the insured for more than the amount of the policy. Within the last three decades, however, the proposition has become well established that the insurer does owe some duty to the insured in effecting settlements. In this respect, two rules of conduct have been announced. Some courts hold the insurer liable for negligence in his conduct of the investigation and negotiations for settlement,[7] while others require that the insurer

[2] Appleman, "Duty of a Liability Insurer to Compromise Litigation," 26 KY. L. J. 100 (1938); Holzendorff, "Liability of Insurers Re 'Excess Judgment'," 18 OKLA. B.A. J. 1732 (1947); 34 A.L.R. 750 (1925); 37 A.L.R. 1484 (1925); 43 A.L.R. 329 (1926); 71 A.L.R. 1485 (1931); 131 A.L.R. 1499 (1941); Dumas v. Hartford Accident & Indemnity Co., 92 N.H. 140, 26 A. (2d) 361 (1942), dismissed without prejudice, 94 N.H. 484, 56 A. (2d) 57 (1947).

[3] 34 COL. L. REV. 511 (1934); 71 A.L.R. 1486 (1931).

[4] It is suggested in Smith, "Liability Beyond Policy Limits," 1946 INS. L. J. 130 that the case of McCoombs v. Fidelity & Casualty Co. of N.Y., 231 Mo. App. 1206, 89 S.W. (2d) 114 (1935), went so far as to place liability on the insurer by reason of the contract. While there is language in the case that might so indicate, the court seems to have based its decision on the fact that "the evidence of bad faith on the part of defendant is ample." Id. at 1223.

[5] Some courts have held that the insurer is the agent of the insured for the purposes of settlement and defense. Hilker v. Western Auto. Ins. Co., 204 Wis. 1, 231 N.W. 257 (1930), affd. 204 Wis. 1, 235 N.W. 413 (1931), reversing Wisconsin Zinc Co. v. Fidelity & Deposit Co., 162 Wis. 39, 155 N.W. 1081 (1916), on this point; Traders & General Ins. Co. v. Rudco Oil & Gas Co., (C.C.A. 10th, 1942) 129 F. (2d) 621. Others have held that the insurer is an independent contractor: Attleboro Mfg. Co. v. Frankfort Marine, Accident & Plate Glass Co., (C.C.A. 1st, 1917) 240 F. 573; Foremost Dairies v. Campbell Coal Co., 57 Ga. App. 500, 196 S.E. 279 (1938).

[6] Auerbach v. Maryland Casualty Co., 236 N.Y. 247, 140 N.E. 577 (1923); McDonald v. Royal Indemnity Ins. Co., 109 N.J.L. 308, 162 A. 620 (1932). Cf. Best Building Co. v. Employers Liability Assurance Corp., 247 N.Y. 451, 160 N.E. 911 (1928); St. Joseph Transfer & Storage Co. v. Employers Indemnity Corp., 224 Mo. App. 221, 23 S. (2d) 215 (1930).

[7] See cases cited 71 A.L.R. 1488-9 (1931) and 131 A.L.R. 1501-2 (1941). Duncan v. Lumbermans Mutual Casualty Co., 91 N.H. 349, 23 A. (2d) 325 (1941); Dumas v. Hartford Accident & Indemnity Co., 92 N.H. 140, 26 A. (2d) 361 (1942), dismissed without prejudice, 94 N.H. 484, 56 A. (2d) 57 (1947); Highway Ins. Underwriters v. Lufkin-Beaumont Motor Coaches, Inc., (Tex. Civ. App. 1948) 215 S.W. (2d) 904.

be guilty of bad faith in order to incur liability beyond the face value of the policy.[8] The courts have given diverse reasons for adoption of the rule that each follows, but it is clear that each is motivated by a feeling that an insurer who has reserved complete control of negotiations for settlement and defense, and has prohibited the insured from settling except at his own cost, should be bound to the responsible exercise of this control.[9]

A. The Negligence Rule

Courts which follow the negligence rule commonly state that the insurer must, in handling all matters pertaining to the litigation, use that degree of care and diligence which an ordinarily prudent person would exercise in the management of his own business.[10] If a reasonable person in the position of the insured would have settled the claim rather than risk trial, and the insurer failed or refused to settle, he will be liable to the insured for the amount of the judgment recovered in excess of the policy limit. Thus, the insured may expect that his interests will be given at least as much consideration as the insurer will give his own.[11] Some courts go even farther and require that, if necessary, the insurer must sacrifice his own interests in favor of those of the insured in order to save the latter harmless.[12]

What, specifically, will constitute negligence in failure to settle a claim when an offer within the policy limits has been made? It is clear

[8] See cases cited 71 A.L.R. 1486-7 (1931) and 131 A.L.R. 1500 (1941). Epstein v. Erie Indemnity Co., 39 D&C 117, affd. without opinion, 343 Pa. 417, 16 A. (2d) 47 (1940); Farm Bureau Mutual Auto Ins. Co. v. Violano, (C.C.A. 2d, 1941) 123 F. (2d) 692, cert. den., 316 U.S. 672, 62 S.Ct. 1043 (1942); Burnham v. Commercial Casualty Ins. Co., 10 Wash. (2d) 624, 117 P. (2d) 644 (1941); Traders & General Ins. Co. v. Rudco Gas & Oil Co., (C.C.A. 10th, 1942) 129 F. (2d) 621; Berk v. Milwaukee Auto Ins. Co., 245 Wis. 597, 15 N.W. (2d) 834 (1944); Olympia Fields Country Club v. Bankers Indemnity Ins. Co., 325 Ill. App. 649, 60 N.E. (2d) 896 (1945), discussed in 13 UNIV. CHI. L. REV. 105 (1945); National Mutual Casualty Co. v. Britt, (Okla. 1948) 200 P. (2d) 407; Royal Transit, Inc. v. Central Surety & Ins. Co., (C.C.A. 7th, 1948) 168 F. (2d) 345, cert. den. 335 U.S. 844, 69 S.Ct. 68 (1948).

[9] See Boling v. New Amsterdam Casualty Co., 173 Okla. 160 at 163, 46 P. (2d) 916 (1935).

[10] See cases cited in note 7, supra.

[11] Douglas v. U.S. Fidelity & Guaranty Co., 81 N.H. 371, 127 A. 708 (1924); Dumas v. Hartford Accident & Indemnity Co., 94 N.H. 484, 56 A. (2d) 57 (1947); Highway Ins. Underwriters v. Lufkin-Beaumont Motor Coaches, Inc., (Tex. Civ. App. 1948) 215 S.W. (2d) 904.

[12] See Tyger River Pine Co. v. Maryland Casualty Co., 170 S.C. 286 at 292-3, 170 S.E. 346 (1933).

that a mere mistake of judgment in deciding to contest rather than to settle, when the insurer has completely informed himself of all circumstances, will not render him liable for an excess judgment under either the negligence or the bad faith rule.[13] The insurer cannot speculate as to the outcome of a trial, however, and courts which adhere to the negligence rule may be more likely to hold him liable for an excess judgment than courts which follow the bad faith rule, when he has guessed wrong as to the outcome. If the insurer has not exercised ordinary care in ascertaining all the facts of the case, both as to liability and damages, or has failed to inform himself of the governing law, then he will be liable.[14] Having exercised reasonable diligence in ascertaining all of these, he must intelligently appraise the danger to the insured, and if it appears that an excess judgment might be recovered against him,[15] must be quick to accept an offer of settlement within the policy limits.[16] Thus, where the facts showed that the liability of the insured was a close question, but the injuries were so severe that if judgment should be recovered against the insured it would be far in excess of the policy limits, the court thought the jury was justified in finding that a reasonably prudent man would have settled the case.[17]

B. The Bad Faith Rule

In jurisdictions following the bad faith rule, it has been stated that, since the reservation of power and control over settlements is for the protection of the insurer, he must be allowed some discretion in the use of this power. While he is not at liberty to disregard the interests of the insured, to hold him to the standard of due care in the conduct

[13] Wakefield v. Globe Indemnity Co., 246 Mich. 645, 225 N.W. 643 (1929); Hilker v. Western Auto. Ins. Co., 204 Wis. 1, 231 N.W. 257 (1930), affd. 204 Wis. 1, 235 N.W. 413 (1931); Georgia Casualty Co. v. Mann, 242 Ky. 447, 46 S.W. (2d) 777 (1932); Maryland Casualty Co. v. Cook-O'Brien Constr. Co., (C.C.A. 8th, 1934) 69 F. (2d) 462, cert. den., 293 U.S. 569, 55 S.Ct. 81 (1934); Hoyt v. Factory Mutual Liability Ins. Co., 120 Conn. 156, 179 A. 842 (1935); Johnson v. Hardware Mutual Casualty Co., 109 Vt. 481, 1 A. (2d) 817 (1938); Lawson & Nelson Sash & Door Co. v. Associated Indemnity Corp., 204 Minn. 50, 282 N.W. 481 (1938).

[14] Stowers Furniture Co. v. American Indemnity Co., (Tex. Com. App. 1929) 15 S.W. (2d) 544, appealed, (Tex. Civ. App. 1931) 39 S.W. (2d) 956; Ballard v. Ocean Accident & Guarantee Co., (C.C.A. 7th, 1936) 86 F. (2d) 449; Maryland Casualty Co. v. Wyoming Valley Paper Co., (C.C.A. 1st, 1936) 84 F. (2d) 633.

[15] Highway Ins. Underwriters v. Lufkin-Beaumont Motor Coaches, Inc., (Tex. Civ. App. 1948) 215 S.W. (2d) 904.

[16] See Dumas v. Hartford Accident & Indemnity Co., 94 N.H. 484 at 488, 56 A. (2d) 57 (1947).

[17] Ibid.

of settlement negotiations would deprive him of this discretion.[18] Therefore, exercise of the power does not involve the assumption of any duty to use due care, nor can such a duty be imposed by law.[19] However, the insurer is bound to exercise the power intelligently, honestly and in good faith. He must consider the interests of the insured as well as his own, and a decision to defend rather than to settle must be grounded on intelligent knowledge of both the facts of the case and the law involved, and must be made with an honest belief in a fair chance of defeating the action or at least of keeping the verdict within the policy limit.[20] Here again, in theory at least, a mere mistake of judgment will not subject the insurer to liability beyond the amount of the policy if it appears that he guessed wrong.[21]

If the insured can show that the insurer failed to interview witnesses of the accident, failed to make an effort to determine if there was any liability on the claim against the insured, did not attempt to acquaint himself with the extent of the injuries on which the claim was based, ignored advice of his adjuster or counsel to settle,[22] or for any other reason refused an offer of settlement when he was not in a position to determine the reasonableness of the offer, bad faith on the part of the insurer is established. Likewise, where the insurer has refused to settle because the insured would not contribute,[23] or because it was contrary to the policy of the company to settle for more than a certain fractional amount of the policy, or because the insurer wanted

[18] Wakefield v. Globe Indemnity Co., 246 Mich. 645, 225 N.W. 643 (1929); Hilker v. Western Auto Insurance Co., 204 Wis. 1, 231 N.W. 257 (1930), affd., 204 Wis. 1, 235 N.W. 413 (1931); Johnson v. Hardware Mutual Casualty Co., 109 Vt. 481, 1 A. (2d) 817 (1938); National Mutual Casualty Co. v. Britt, (Okla. 1948) 200 P. (2d) 407.

[19] Wakefield v. Globe Indemnity Co., 246 Mich 645, 225 N.W. 643 (1929).

[20] See National Mutual Casualty Co. v. Britt, (Okla. 1948) 200 P. (2d) 407 at 412.

[21] See note 14, supra.

[22] The outstanding exception seems to be Wakefield v. Globe Indemnity Co., 246 Mich. 645, 225 N.W. 643 (1929), where the insurer was not held liable for the excess even though his attorney, during trial, advised of the hopelessness of the case and strongly recommended settlement.

[23] The courts are not agreed whether the mere attempt to coerce the insured into contributing to the settlement, when the insurer is not willing to pay even the amount of the policy, is in itself sufficient to make the insurer liable on the basis of bad faith. See discussion, 71 A.L.R. 1495 et seq. (1931). Cf. the following recent cases: Spang Baking Co. v. Trinity Universal Ins. Co., (Ohio App. 1946) 68 N.E. (2d) 122, discussed in 1 WYO. L. J. 138 (1947); and 25 TEX. L. REV. 423 (1947); Wordy v. Farmers Auto Ins. Assn., 328 Ill. App. 312, 65 N.E. (2d) 619 (1946); Lawson & Nelson Sash & Door Co. v. Associated Indemnity Corp., 204 Minn. 50, 282 N.W. 481 (1938); Cherry v. Shelby Mutual Plate Glass & Casualty Co., 191 S.C. 177, 4 S.E. (2d) 123 (1939).

to establish a precedent,[24] such arbitrary conduct will be grounds for recovery by the insured under the bad faith rule.[25]

C. *Application of the Rules*

In spite of the differences in the reasons given by various courts, the rules adopted and the language used, it seems that the results reached are much the same.[26] Clearly, an insurer should be liable to the insured for the excess of a judgment over the policy limits if he has failed to act at all, has acted arbitrarily, or has completely disregarded the interests of the insured. Equally clearly, if an insurer has made a full investigation of the claim, has done what he reasonably could in order to hold the insured harmless, and yet has lost a closely contested case, he should not be liable to the insured for more than the contract amount. While the facts[27] of most cases indicate that the same result would have been reached regardless of which rule the court professed to apply, the difficulty comes in the just administration of these rules.

In a few jurisdictions it is held that the question of the insurer's negligence or bad faith in his conduct of negotiations for compromise is a matter for the court to decide.[28] Most courts have stated, however, that unless there is insufficient evidence on this matter,[29] it is a jury question.[30] The practice of submitting this issue to the jury has been

[24] Aycock Hosiery Mills v. Maryland Casualty Co., 157 Tenn. 559, 11 S.W. (2d) 889 (1928).

[25] See Wakefield v. Globe Indemnity Co., 246 Mich. 645 at 653, 225 N.W. 643 (1929).

[26] In some cases it is not clear what rule the court followed in making its decision. Spang Baking Co. v. Trinity Universal Ins. Co., (Ohio App. 1946) 68 N.E. (2d) 122. The Wisconsin court has professed to follow the bad faith rule but has defined it in terms of negligence. Hilker v. Western Auto. Ins. Co., 204 Wis. 1, 231 N.W. 257 (1930), affd., 204 Wis. 1, 235 N.W. 413 (1931). A court professing to follow the negligence rule was willing to concede a good deal of discretion to the insurer in making his decision in Highway Ins. Underwriters v. Lufkin-Beaumont Motor Coaches, Inc., (Tex. Civ. App. 1948) 215 S.W. (2d) 904.

[27] In most reports, the facts are not set out in much detail. But see McCoombs v. Fidelity & Casualty Co. of N.Y., 231 Mo. App. 1206, 89 S.W. (2d) 114 (1935); Highway Ins. Underwriters v. Lufkin-Beaumont Motor Coaches, Inc., (Tex. Civ. App. 1948) 215 S.W. (2d) 904; National Mutual Casualty Co. v. Britt, (Okla. 1948) 200 P. (2d) 407; Royal Transit Co. v. Central Surety & Ins. Co., (C.C.A. 7th, 1948) 168 F. (2d) 345, cert. den., 335 U.S. 844, 69 S.Ct. 68 (1948).

[28] Burnham v. Commercial Casualty Ins. Co., 10 Wash. (2d) 624, 117 P. (2d) 644 (1941); Berk v. Milwaukee Auto. Ins. Co., 245 Wis. 597, 15 N.W. (2d) 834 (1944).

[29] Wakefield v. Globe Indemnity Co., 246 Mich. 645, 225 N.W. 643 (1929).

[30] See cases cited in notes 7 and 8, supra.

criticized,[31] and it appears that this is a major weakness in the administration of either rule. In most cases the character of the insurer's acts will be in doubt, and judges, much less juries, are seldom qualified to determine in such cases whether the decision of the insurer to defend rather than to settle was unreasonable or made in bad faith. It appears that the only way to obviate this difficulty is to receive the expert testimony of insurance adjusters and attorneys as to the reasonableness or fidelity of the insurer's action, so the jury may form its conclusions on the basis of reactions of persons familiar with the work.

There is the further difficulty that hindsight is likely to influence the finding of the jury in the action against the insurer. It is likely to rely on the verdict of the jury in the suit against the insured, and since the atmosphere of the other trial (e.g., the demeanor of the witnesses) cannot be reproduced, the finding of that jury will be given more weight than it warrants. These factors make it risky for the insurer to decide on defense rather than settlement. Although his decision may have been justified under the circumstances as they then appeared, the subsequent verdict against the insured will be quite likely to put those circumstances in a different light.

Another point must be considered, however, which has often worked to the advantage of the insurer. The attention of the jury has not usually been directed to the fact that when the insurer decided to defend rather than to settle, his decision was not accompanied by his undertaking the full share of the risk. The insured has given up all right to participate in the settlement, and yet has no part in making the decision which subjects him to the risk of a judgment in excess of the policy limit. Further, it is clear that as the amount of the settlement offer approaches the limit of the policy, the incentive for the insurer to gamble with trial of the claim increases, since he has less to lose. If courts continue to submit to the jury the issue of the character of the insurer's action, the jury's attention should be called to these facts, because of their possible bearing on the insurer's motives in deciding to try the claim.

There appear to be other ways in which the difficulties suggested above could be avoided, while achieving protection for the insured without exposing the insurer to undue hazard. The issue of insurer's liability for the excess judgment might be made one for the court, or

[31] 13 UNIV. CHI. L. REV. 105 (1945); 1946 INS. L. J. 130; Appleman, "Duty of Liability Insurer to Compromise Litigation," 26 KY. L. J. 100 (1938); APPLEMAN, AUTOMOBILE LIABILITY INSURANCE 84 et seq. (1938); 8 APPLEMAN, INSURANCE LAW & PRACTICE 71 et seq. (1942).

it might be dealt with in the insurance contract. Since the insurer has reserved complete control of matters relating to compromise and defense, he should be required to assume the risks that are coincident with the benefits acquired. Requiring the insurer to pay the full amount of any judgment rendered against the insured would certainly require him to act as a reasonable man in the position of the insured would act in the conduct of his own affairs. Unlimited liability following a decision to defend is not likely to be approved by insurers, however; nor are the courts likely to discard the bad faith and negligence rules. A requirement of this sort would probably have to be imposed by the legislature.

Much the same result might be achieved by providing that the insurer should be liable for double the amount of the policy should he elect to defend.[32] If the courts continue to hold that the contract provisions giving complete control to the insurer relieve him of any obligation to inform the insured of offers of settlement,[33] the increase of the insurer's liability when he elects to defend would seem even more desirable.[34] While there would perhaps not be many cases in which the insured would be willing to contribute to the settlement, when the insurer was not paying the full amount of the policy,[35] it would seem

[32] Such was the contract provision involved in Georgia Life Ins. Co. v. Miss. Central R. Co., 116 Miss. 114, 76 S. 646 (1917).

[33] Best Building Co. v. Employers Liability Assurance Corp., 247 N.Y. 451, 160 N.E. 911 (1928); Norwood v. Travelers Ins. Co., 204 Minn. 595, 284 N.W. 785 (1939); Service Mutual Liability Ins. Co. v. Aronofsky, 308 Mass. 249, 31 N.E. (2d) 837 (1941). Cf. Bartlett v. Travelers Ins. Co., 117 Conn. 147, 167 A. 180 (1933); and Burnham v. Commercial Casualty Ins. Co., 10 Wash. (2d) 624, 117 P. (2d) 644 (1941), where keeping the insured informed of offers of settlement evidenced good faith on the part of the insurer.

[34] The insured may be able to settle, before trial, his possible liability in excess of the policy limits. Farmers Gin Co. v. St. Paul Mercury Indemnity Co., 186 Miss. 747, 191 S. 415 (1939). Further, it has been held that the insurer must notify the insured if the judgment is likely to be in excess of the policy limits. Hilker v. Western Auto. Ins. Co., 204 Wis. 1, 231 N.W. 257 (1930), affd., 204 Wis. 1, 235 N.W. 413 (1931). The desirability of notification is illustrated in Blue Bird Taxi Corp. v. American Fidelity & Casualty Co., (D.C.S.C. 1939) 26 F. Supp. 808, where the insurer had failed to notify the insured of the offer of settlement, and the latter's taxi cabs had been levied upon and sold to satisfy the excess of the judgment, ruining his business.

[35] In Traders & General Ins. Co. v. Rudco Gas & Oil Co., (C.C.A. 10th, 1942) 129 F. (2d) 621, the insured paid the full amount of the settlement as the insurer had denied liability and insured thought the case was dangerous. In the following cases, insured alleged willingness to contribute: Best Building Co. v. Employers Liability Assurance Corp., 247 N.Y. 451, 160 N.E. 911 (1928); Royal Transit, Inc. v. Central Surety & Ins. Co., (C.C.A. 7th, 1948) 168 F. (2d) 345, cert. den., 335 U.S. 844, 69 S.Ct. 68 (1948). And in the following cases insured was willing to pay the excess of the settlement offer over the policy limits: Boling v. New Amsterdam Casualty Co., 173 Okla. 160, 46 P. (2d) 916 (1935); Norwood v. Travelers Ins. Co., 204 Minn. 595, 284 N.W. 785 (1939).

that good faith on the part of the insurer would require that the insured be given this opportunity in cases where the insurer, while he would be justified in trying the action, is not convinced that he can defeat the action altogether or keep the judgment below the offer of settlement.[36] This becomes particularly important where the offer approaches the policy limit and the incentive for the insurer to gamble on trial increases.

While the theory of the negligence and bad faith rules seems to guarantee justice to both insurer and insured, the difficulties of practical application of these standards indicate that some other course must be adopted. Such a move seems necessary if the insured is to be guaranteed the full measure of protection contracted for and the insurer relieved of the hazard of unenlightened jury action.[37]

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[36] It must be remembered, too, that the usual policy allows the insured to settle at his own cost.

[37] Consideration has here been limited primarily to suits by the insured. In a few cases, the claimant has tried to collect the excess from the insurer, but has generally been unsuccessful. Bartlett v. Travelers Ins. Co., 117 Conn. 147, 167 A. 180 (1933); Kleinschmit v. Farmers Mutual Hail Ins. Assn., (C.C.A. 8th, 1939) 101 F. (2d) 987; Duncan v. Lumbermans Mutual Casualty Co., 91 N.H. 349, 23 A. (2d) 325 (1941); but cf. Auto Mutual Indemnity Co. v. Shaw, 134 Fla. 815, 184 S. 852 (1938).